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No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-v.-

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the minimum standard of competence which must be displayed by an attorney for a criminal defendant in order to provide effective assistance of counsel under the Sixth Amendment should be the reasonable competence standard adopted by eleven Circuit Courts, the "farce and mockery" test of the Second Circuit, or some other appropriate standard of competence?

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Nathan Solomon, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York dismissing a petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals was rendered on May 13, 1983, and will not be officially reported. A copy of the opinion is annexed as Exhibit A.

The opinion of the District Court was not officially reported. A copy of the District Court opinion is annexed as Appendix B.

The New York State Supreme Court denied on the merits petitioner's coram nobis petition alleging incompetency of counsel. A copy of this decision is annexed as Exhibit C. The Supreme Court, Appellate Division denied leave to appeal.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1983; a copy of the judgment is annexed as Appendix A. On June 30, 1983, the Court of Appeals denied a timely application for rehearing en banc. A copy of the order denying rehearing en banc is annexed as Appendix D. No application has been filed for an extension of time in which to file this petition.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner was charged on August 1, 1974 in a Bronx County indictment of acting in concert with Joseph Miller on two separate counts: murder in the second degree and felonious possession of a weapon. The indictment alleged that on June 18, 1974, petitioner and Miller caused the death of Norman Duncan.

Counsel's Pretrial Conduct

On August 18, 1974, the law firm of Robert M. Gardner filed a notice of appearance pursuant to its appointment as counsel for petitioner under New York County Law §18-B. Attorney David Isaacson was the attorney who worked on petitioner's case and appeared at trial for him.

On September 24, 1975, six months before the trial began, petitioner filed a pro se motion for reassignment of counsel. In this motion, petitioner stated that Isaacson had failed to visit him, had not submitted any motions to protect his constitutional rights, had failed to conduct any fact-finding, and had not corresponded with him.

Appointed counsel finally hired a private investigator in October, 1975, one year and three months after the incident, and one month after petitioner's first pro se motion. On November 7, 1975, appellant filed another pro se application for a writ of habeas corpus for a bail reduction. Co-defendant Miller had been released on bail; petitioner was still in jail. Both of the pro se motions were denied.

Petitioner's allegations of inadequate pretrial preparation were confirmed in the "Voucher for Compensation and Expenses of Appointed Counsel" submitted by Mr. Gardner on August 17, 1976, and certified by him as true. Section 2 of the form, entitled "Time Spent in Preparation (Out of Court)" indicated that from August 19, 1974, to March 25, 1976, when the trial ended, counsel spent no hours in interviews with his client, did no legal research, interviewed no witnesses, and consulted with no prosecution officials. The first entry for out of court preparation was

for March 20, 1976 for 2 hours of "exam. of files at home" -- four days after the trial had started. The first time that assigned counsel consulted with an investigator according to this voucher was on that same date for two hours. Upon examining the expense voucher, therefore, it appears that absolutely no preparation was done before the trial started.

Counsel's Trial Representation

Petitioner was convicted along with Miller of second degree murder. The deceased and an associate of his, Isom, had both planned a robbery of their boss, Miller, because they were dissatisfied with the pay they were receiving. Miller was a drug dealer who allegedly employed petitioner as his "bodyguard," employed Duncan and Isom as lookouts, and employed George McFadden as a seller.

At about 5:30 on June 18, 1974, after considerable drinking, Duncan met Isom at 173rd Street and Southern Boulevard in the Bronx. Isom had a drink on the street with Duncan. Duncan and Isom then started to walk down Hoe Avenue from 173rd Street to 172nd Street. They passed Solomon who was sitting in his beach chair in the middle of the block. Isom was carrying a paper bag which contained a gun. After passing Solomon, Isom and Duncan reached McFadden who was sitting on the stoop of a building. (Earlier that day, Duncan had threatened McFadden saying that if he and Isom did not get what was coming to them, then McFadden was "going to get his.") Isom walked about four feet past Duncan and McFadden. Duncan then started

struggling with McPadden. At this point Solomon noticed the struggle, went down on one knee, drew a gun and fired from a distance of 35 to 50 feet. Once Solomon fired, Isom pulled a gun out of the paper bag he was carrying and fired back.

During the cross-fire between Solomon and Isom, Duncan was struck in the left chest by one bullet which proved fatal.

Isom testified that a week after the shooting, Miller talked to him about it. Miller then told Isom "My man could have killed you too."

Petitioner's defenses were (a) that the State could not prove beyond a reasonable doubt that petitioner had not reasonably believed his actions necessary to prevent the robbery of a co-worker and (b) that the State could not, in any event, prove beyond a reasonable doubt that the bullet that killed Duncan was fired by petitioner rather than by the other gunman in the incident. By its own statement, the prosecution's most important "guidepost" to the jury was co-defendant's hearsay statement that "My man could have killed you too." In summation, the prosecution stated:

> The fifth and final guidepost was Miller's words. He said, and now we get to the remark that I asked you to keep in the beginning, "My man could have killed you too." His man was Nathan Solomon. That his man could have killed Isom too. Is there any doubt in light of that remark that it was Miller's plan and that it was Miller's time and Solomon was Miller's man and acting out that plan?

Petitioner presented one defense witness: The private investigator hired by appointed counsel one year and three months after the incident. This private investigator

was put on the stand to introduce a tape recording wherein Isom allegedly stated that he had not seen petitioner fire his gun. Yet, on cross-examination, the prosecutor pointed to four places in the transcript where Isom actually stated that he had seen petitioner fire. The investigator then admitted that he had not read the transcript before testifying and that petitioner's appointed counsel had given him no instructions or guidance.

The record additionally indicates that appointed counsel did not move for separate trials; did not file any pretrial motions to discover information of the prosecution, to suppress inadmissible evidence, or to reduce petitioner's bail; and did not object to the prosecution's introduction of extensive background evidence of defendant's drug-related activities.

In 1979, petitioner commenced a coram nobis proceeding to vacate the conviction based on the inadequacy of trial counsel in violation of the Sixth and Fourteenth Amendments. The judge, who had been the trial judge and was the judge who had approved trial counsel's §18-B voucher denied petitioner's coram nobis petition on the merits. Permission to appeal to the Appellate Division was denied. A further appeal to the New York Court of Appeals is not permissible. Petitioner then filed a pro se petition for habeas corpus in the Federal District Court for the Southern District of New York alleging, among other things, that trial counsel had ineffectively represented him. The

district court denied the petition.* The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

The Circuit Court's opinion in this case reasoned that (1) trial counsel's infrequency of consultative visits, standing alone, did not make representation a "farce and mockery," (2) "some investigative work" done by the private investigator negated the claim of insufficient investigation and (3) the failure of trial counsel to object to the Bruton statement was not facially incompetent, because an objection may have brought it too much attention as "Solomon's status as Miller's armed bodyguard was virtually conceded, and Miller's hearsay statement merely reaffirmed his playing of that role."

REASONS FOR GRANTING THE WRIT

This case presents an important issue for the Court's consideration -- whether the appropriate standard under the Sixth Amendment for judging the adequacy of an accused's trial counsel's representation should be the "farce and mockery" standard of the Second Circuit or the reasonable competence standards adopted by all the other Federal Circuit Courts of Appeals. This Court has never

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* The district court, in its original opinion, did not consider the inadequacy of counsel issue because, apparently unaware of the coram nobis petition, it held that petitioner had not exhausted his state remedies. The district court later issued a corrective memorandum, stating that state remedies indeed had been exhausted, but went on to deny petitioner's claim on the merits. However, before this corrective memorandum was issued, petitioner already had filed his notice of appeal. There being no question of exhaustion before the Second Circuit, that Court went directly to the merits of the inadequacy of counsel issue.

directly addressed this issue and a decision from this Court is needed to resolve the disarray of standards at the Circuit level.

The instant case presents a striking example of a shockingly unprepared, confused and lackadaisical attorney who deprived petitioner of a chance at a fair trial. The record indicates that prior to this nine-day trial for second degree murder, appointed counsel spent absolutely no time in preparation. Trial counsel spent no time interviewing the client, did no legal research, had no interviews with witnesses, and charged no time in consultation with prosecution officials. Six months before the trial began, petitioner attempted to have his counsel reassigned because of the blatant failures.* Petitioner even had to file a pro se motion for reduction in bail.

Aside from the lack of preparation at trial, which ipso facto may be inadequate representation, appointed counsel additionally made numerous major errors at trial. Most egregiously, he failed to object to the introduction of co-defendant Miller's inculpatory hearsay statement, "My man could have killed you too." This statement was clearly inadmissible under the dictates of Bruton v. United States, 391 U.S. 123 (1968), and was the major vehicle through which the prosecutor cast petitioner's acts as being part of Miller's "plan". Second, the only witness that trial counsel put on the stand for petitioner, the private investigator who was hired one year and three months after the

* Only after that motion did trial counsel hire a private investigator. The difficulty of finding witnesses to a street crime 1-1/4 years after the incident is self-evident.

commission of the alleged street crime, was woefully unprepared and was directly contradicted and disgraced in cross-examination by the prosecutor. Appointed counsel made other numerous mistakes, such as failing to object to introduction of irrelevant testimony of alleged drug dealings; failing to object to the judge's erroneous jury charge; failing to ask for a separate trial in view of the Bruton statement; and cross-examining witnesses in a confused and fruitless manner.

The Second Circuit did not agree that trial counsel's representation made petitioner's trial a "farce and mockery" of justice. However, neither did it state that trial counsel's representation met the reasonable competence tests outstanding in all the other circuits. This omission is significant, because in every recent reported case in the Second Circuit where the "farce and mockery" standard (see below) was applied, the Court declined to grant the writ on the additional ground that the appellant could not even satisfy the reasonable competence test. See e.g., Brinkley v. LeFevre, 621 F.2d 45 (1980); United States v. Aulet, 618 F.2d 182 (1980); Bellavia v. Fogg, 613 F.2d 369 (1979); Indiviglio v. United States, 612 F.2d 624 (1979) (Mansfield, J. concurring); United States v. Taylor, 562 F.2d 1345 (1977); United States v. Daniels, 558 F.2d 122 (1977); United States v. Medico, 557 F.2d 309 (1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (1976). Here, there was no such finding. Indeed, Judge Oakes concurred in the decision because he felt "bound

by the present law of the Circuit," implying that the holding may have been different under the reasonable competence standard.

The case of United States v. Wight, 176 F.2d 376 (D.C. Cir. 1949), cert. denied, 338 U.S. 950 (1950), set the standard of review for inadequa -of-counsel claims in the Second Circuit. This standard, adopted by the other Federal Circuits, then abandoned by all circuits other than the Second,* demands that the trial counsel's representation be so poor as to make the trial "a farce and a mockery of justice." According to the Second Circuit, even counsel's falling asleep during trial does not meet this test. See, United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970).

The Circuit Court's opinion in this case reasoned that (1) trial counsel's infrequency of consultative visits, standing alone, did not make representation a "farce and mockery," (2) "some investigative work" done by the private investigator negated the claim of insufficient investigation and (3) the failure of trial counsel to object to the Bruton statement was not facially imcompetent, because an objection may have brought it too much attention as "Solomon's status as Miller's armed bodyguard was virtually conceded, and Miller's hearsay statement merely reaffirmed his playing of that role."

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* See, e.g., United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975); Hawkman v. Parratt, 661 F.2d 1161, 1165 (8th Cir. 1981); Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc) cert. denied, 445 U.S. 945 (1980); United States v. DeCoster, 624 F.2d 196, 202-07 (D.C. Cir. 1979) (en banc).

Unfortunately, the Circuit opinion ignored other cited deficiencies of trial counsel, and misanalyzed the ones it mentioned.

First, petitioner argued that the failings of trial counsel taken as a whole made the trial a farce and mockery of justice, and at the least, showed a severe lack of reasonable competence. The Court's statement that lack of consultative visits standing alone does not make representation of farce and a mockery is thus inapposite. Second, the contention that not objecting to the Bruton statement was a reasonable tactical judgment completely ignores the record. Petitioner never conceded that his bullet killed Duncan, nor that he acted in concert with Miller in this particular incident. The Bruton statement was the lynchpin of the prosecution's closing statement, and was mentioned by the judge in his charge as a vital piece of evidence in the prosecution's case. Third, the Circuit Court opinion ignored the fiasco of the private investigator's testimony; the fact that trial counsel waited 1-1/4 years to hire the investigator; the fact that petitioner was not released on bail because of default of trial counsel and therefore could not have cooperated as fully in his own defense had he been released on bail as was codefendant; and the other failings mentioned above. The totality of the circumstances was thus overlooked by the Circuit Court.

The Second Circuit felt that trial counsel's omissions did not convert petitioner's trial into a farce and

a mockery of justice. However, if the record of trial counsel's efforts were analyzed under the "reasonable competence" standards, this Court would find that trial counsel's efforts fell far below that standard. The proper choice of standard would thus determine the outcome of this case. This case is therefore an appropriate vehicle for the Court to define the minimum quality of representation required to be provided to indigent defendants. See, Maryland v. Marzullo, 435 U.S. 1011, 1012 (1977) (White, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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Attorneys for the Petitioner.

Of Counsel:

Daniel B. Rubock

New York, New York
September 28, 1983

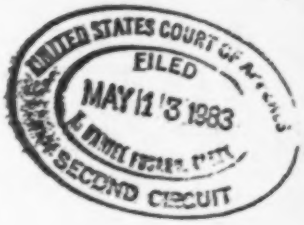
N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ATES COURT OF APPEALS

HE SECOND CIRCUIT

81-2180

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of May , One Thousand Nine Hundred and Eighty-Three.



Present:

Honorable James L. Oakes,
Honorable Richard J. Cardamone,
Honorable Ralph K. Winter,
Circuit Judges.

Nathan Solomon,
Petitioner-Appellant,

v.

ORDER
#81-2180

David Harris, Warden of Green Haven Correctional Facility, and Robert Abrams, Attorney General of the State of New York,
Respondents-Appellees.

Nathan Solomon appeals from a final judgment of the United States District Court for the Southern District of New York, Brieant, Judge, denying his petition for a writ of habeas corpus. The petition claims that Solomon was denied effective assistance of counsel, that testimony at trial was admitted in violation of Bruton v. United States, 391 U.S. 123 (1968), and that petitioner's guilt was not proven beyond a reasonable doubt. We affirm.

Petitioner was tried in Bronx County, New York, and found guilty of murdering Norman Duncan. The evidence at trial

established that petitioner, Duncan and others were all members of a loosely knit group of narcotics peddlers. Joe Miller, the dealer, was the group's leader, Solomon was his "bodyguard," the victim Duncan and Donald Isom were both lookouts, and George McFadden was a seller. Prior to the killing on June 18, 1974, Duncan and Isom had become upset over the pay they were receiving from Miller. The pair thought Miller was in league with McFadden and therefore decided to rob either or both of them. McFadden heard of this possibility in the early afternoon of June 18. He so informed Miller who in turn armed Solomon when the three gathered on 173rd Street and Hoe Avenue later that same afternoon. Between 5:30 and 6:00 p.m., Duncan and Isom arrived and walked past Solomon toward McFadden. The latter was sitting on the stoop of a building located midway between 173rd and 172nd Street on the east side of Hoe Avenue. When Duncan and Isom reached McFadden, Duncan moved towards him while Isom continued to walk past him. A "scuffle" ensued between Duncan and McFadden and Solomon, standing fifty feet south of McFadden on the same side of Hoe, dropped to one knee and began firing.

At some point, Isom returned the fire, but the jury could have found that Isom's fire occurred after Solomon's and was in any event directed toward Solomon, not toward Duncan and Isom. The jury could thus easily have found that Duncan was hit by a bullet fired by Solomon. Other relevant evidence was a statement by Isom that Solomon's co-defendant Miller said to him

a week later, "My man could have got you too." The statement was not objected to by Solomon's counsel.

On March 25, 1976, Solomon was found guilty of acting in concert with Miller to cause second degree murder. On appeal to the Appellate Division, he raised for the first time the claim that Miller's statement was inadmissible under Bruton, supra, and requested that the court order a new trial under its interest of justice jurisdiction. Though other objections were raised as well, the Appellate Division on February 2, 1978, affirmed his conviction without opinion. On April 18, 1979, Solomon began a state coram nobis proceeding in which he claimed that his Sixth and Fourteenth Amendment rights had been violated due to ineffective assistance of counsel. Included in this claim were assertions that trial counsel had not adequately investigated or prepared the case and did not adequately conduct the trial. The failure to object to the purported Bruton violation was cited in support of the latter assertion. On May 15, 1979, that petition was also denied.

Having exhausted his state remedies, Solomon petitioned for a writ of habeas corpus in the federal district court. Six claims were raised, three of which were later waived. The remaining live claims relate to the issues of effective assistance of counsel, the alleged violation of Bruton and the sufficiency of the evidence establishing petitioner's guilt. Judge Brieant rejected the first and the last claims and held that

any error incident to the putative Bruton violation was harmless beyond a reasonable doubt.

The standard against which a claim of ineffective counsel is measured in this Circuit is a stringent one. "Unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice," the Sixth Amendment right to effective counsel is not infringed. See United States v. Wright, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States v. Helgesen, 669 F.2d 69 (2d Cir. 1981); United States v. Audet, 618 F.2d 47 (2d Cir. 1980). To determine whether counsel's representation constitutes such an abuse, the strengths of the government's case must be balanced against an assessment of the harm, if any, done by the cited examples of ineffectiveness. Here that balance weighs in the state's favor. The evidence at trial was plainly sufficient to support a verdict of guilt beyond a reasonable doubt. Petitioner's claim of ill-preparedness is tied largely to the alleged infrequency of consultative visits by counsel, the purported failure to interview witnesses, and the failure to raise the Bruton objection. The first, however, has been specifically held not to render representation a farce and a mockery, at least when it stands alone. Brinkley v. LeFevre, 621 F.2d 45, 46 (2d Cir. 1980). As to the purported failure to interview witnesses, some investigative work was done by a court-appointed private investigator and we regard the claim that further investigation would have benefited Solomon as

entirely speculative. As to the Bruton argument, Solomon never objected at trial or at the time of the court's instructions to the alleged violation of Bruton. The Appellate Division, presented with a request to invoke its interest of justice jurisdiction and with arguments by the state asserting both a procedural bar to the Bruton claim and a meritorious defense, simply affirmed without opinion. As a result, adequate independent state grounds existed for the affirmance of Solomon's conviction, namely, that an objection was never raised below as required by the contemporaneous objection rule.

We must assume that the Appellate Division's decision rests on that state procedural default. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir. 1982). So framed, the issue now is whether the default was waived under the "cause and prejudice" test. Wainwright v. Sykes, 433 U.S. 72 (1972). Solomon argues that "cause" is present in the ineffective assistance he received from his counsel and that, for Wainwright purposes, "cause" is a lack of reasonable competence. However, we need not determine what level of lack of competence is applicable, since the decision not to object was not facially incompetent. Counsel may have been well-advised simply to allow the statement in without drawing undue attention to it. Solomon's status as Miller's armed bodyguard was virtually conceded, and Miller's hearsay statement merely reaffirmed his playing of that role. That the prosecutor subsequently relied upon the statement in a not particularly

logical argument does not affect the conclusion that at the time of admission, a failure to object was a reasonable tactical judgment.

Affirmed.

Judge Oakes concurs in the foregoing judgment as bound by the present law of the Circuit, nevertheless reserving the right to request a vote on rehearing en banc in the event a petition therefor is filed.

James L. Oakes
Honorable James L. Oakes

Richard J. Cardamone
Honorable Richard J. Cardamone

Ralph K. Winter
Honorable Ralph K. Winter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATHAN SOLOMON,

Petitioner,

-against-

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

- -X

Pro Se 80 Civ. 4321-CLB

MEMORANDUM AND ORDER

Brieant, J.

Petitioner, Nathan Solomon, a New York State prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He claims that his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated in the course of his state court conviction of murder in the second degree.

Respondents have filed an affidavit and a memorandum in opposition to the petition, and have provided the Court with the transcripts of petitioner's trial and sentencing in state court, as well as the briefs submitted by the parties in the petitioner's state appeal. For the reasons set forth below, the petition and application are denied.

Petitioner was charged in an indictment by a Bronx County Grand Jury on August 6, 1974 with the felonies of murder in the second degree and

possession of a weapon. On June 16, 1976, after a joint trial with Joseph Miller before a jury, petitioner was convicted of murder in the second degree. N. Y. Penal Law § 125.25(1). He was sentenced to an indeterminate term of twenty-five years to life imprisonment. His conviction was affirmed without opinion on December 15, 1977, People v. Solomon, 60 A.D.2d 798 (1st Dept. 1977), and leave to appeal to the Court of Appeals was denied on February 2, 1978.

As adduced from the trial transcript, the relevant facts concerning the incident resulting in petitioner's conviction are as follows. The petitioner, Solomon, the victim Duncan, as well as Isom, Hayes, Lucas and McFadden, were all employed by co-defendant Miller, a major narcotics dealer, in connection with a conspiracy to distribute drugs. Approximately four or five months before the fatal shooting, Duncan and Isom conceived a plan to rob Miller or one of his fellow criminals. About a week before the shooting involved in the instant case, Miller let Isom know that he was aware of this plan to rob him. Nevertheless, Miller continued to pay Isom when Isom requested him to do so. About a week before the murder, Miller began to pay Isom and Duncan less than before for services rendered in his drug operations. On the day of the shooting, Duncan complained to McFadden about inadequate pay. Duncan threatened McFadden, saying that if he and Isom did not receive a fair share, McFadden "was going to get his." Hayes testified that Duncan told him earlier on the day of the shooting that he was going to rob McFadden because he was not getting paid. Duncan telephoned Isom on the day of the shooting and requested his assistance, although, according to Isom, Duncan did not reveal his reasons for the request.

Approximately forty-five minutes before the shooting Miller handed petitioner Solomon a gun. When Duncan and Isom arrived on the scene, a point in the street at Hoe Avenue near 173rd Street, they immediately walked past petitioner Solomon, who was sitting in a chair on the sidewalk. They walked toward McFadden. Duncan then began to wrestle with McFadden; petitioner immediately dropped to one knee and began firing at Duncan at a point blank range of about fifty feet. It was June 18, 1974, between 6:00 and 6:30 P.M., daylight hours. Isom returned the fire. During the shooting, co-defendant Miller shouted encouragement to Solomon to continue firing.

Isom testified on direct examination by the People that approximately one week later, Miller told Isom: "My man could have killed you too," and that Miller identified his "man" as petitioner.

In his petition for habeas corpus, petitioner challenges the sufficiency of the evidence supporting his conviction, portions of the trial court's jury charge, the admission into evidence of testimony regarding petitioner's drug-related activities, the admission into evidence of co-defendant Miller's hearsay statement, which petitioner asserts inculpated him in the murder, the sentence by the trial court, and the adequacy of representation of his counsel at trial.

Petitioner has exhausted his state remedies as to all issues raised here which were presented to the Supreme Court of the State of New York, Appellate Division, First Department, which affirmed his judgment of conviction. See, Picard v. Connor, 404 U.S. 270, 275-76 (1971); Twitty v.

Smith, 614 F.2d 325, 332 (2d Cir. 1979). Since petitioner did not raise his Sixth Amendment claim of inadequacy of representation of counsel in his brief on appeal, there is no exhaustion as to this claim. The contentions are discussed separately below.

Sufficiency of the Evidence

Petitioner claims that the prosecution failed to prove beyond a reasonable doubt that his actions were not legally justified, and that petitioner caused the victim's death.

A federal court will grant a writ of habeas corpus to a state prisoner challenging his conviction on the ground of insufficient evidence only if the Court finds that, based on the evidence adduced at trial, no rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

A review of the record in this case in the light most favorable to the prosecution demonstrates that a rational factfinder readily could have found the petitioner guilty beyond a reasonable doubt of murder in the second degree under New York law.

Justification

The People were required to disprove justification beyond a reasonable doubt. N. Y. Penal Law § 35.15(1) provides:

> "A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person."

In addition, § 35.15(2)(a) and (b) state that a person may not use deadly physical force upon another person under circumstances specified in subdivision one unless he reasonably believes that such other person is using or about to use deadly physical force, or is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.

At trial, eyewitness Isom testified that Duncan grabbed McFadden. Eyewitness Hayes testified that Duncan started struggling with McFadden, and that as soon as the struggle started, Solomon jumped out of his chair, and, crouching on one knee, started firing the gun at Duncan. Hayes also testified on cross-examination that no punches were thrown; he characterized the incident between McFadden and Duncan as a "minor struggle." The proof showed that petitioner continued to shoot at Duncan after Duncan had run away from McFadden, while Miller was yelling at petitioner, telling him to continue shooting. From this evidence, a juror could reasonably conclude beyond a reasonable doubt that when petitioner opened fire on Duncan, petitioner did not reasonably believe that Duncan was using or about to use deadly physical force and did not reasonably believe Duncan was attempting to rob McFadden.

Causation

At the trial, three eyewitnesses testified on the People's direct case that petitioner shot at the victim Duncan. Testimony was also given that as soon as Duncan started struggling with McFadden, Solomon immediately assumed a firing position and aimed at Duncan, with Isom returning Solomon's fire.

The evidence at trial, while contradictory, viewed as it must be, most favorably to the prosecution, showed that Duncan was already staggering by the time Isom returned petitioner's fire. It is significant that Solomon aimed at Duncan and that Isom aimed at Solomon, not Duncan. There is no evidence that more than two people, petitioner and Isom, were firing guns.

From this evidence a rational trier of fact could have found beyond a reasonable doubt that petitioner caused Duncan's death, without any necessity to rely on the testimony of the medical examiner.[1/] Nor is there any question of constitutional magnitude arising out of the failure of the trial court and the lawyers to preserve a complete stenographic record of the testimony given at trial with the aid of a map or diagram of the scene of the crime. Upon his first use of the diagram, the prosecutor proposed to have the witnesses use markers to draw on the diagram. However, the trial court directed no markers be used. Hayes, Lucas and Isom each described the positions of the parties when the shooting began and throughout the incident, by reference to the diagram. Hayes testified that Duncan ran across to "this" side of the street, that Isom moved "right there," that Isom "ran up this street" and that Duncan "ran up here." Similarly, on Isom's direct examination, he referred to the diagram, and testified that Duncan "took out over here" and Solomon "went and got across the street over here." See also the testimony of Lucas. This careless use of the diagram was merely illustrative, for the benefit of the jury, and was not essential to the determination of petitioner's guilt. Therefore, the vague references to the diagram on the part of the witnesses does not constitute reversible

error. United States v. Conlin, 551 F.2d 534 (2d Cir. 1977). If indeed any error was committed, this Court concludes that from a study of the entire record of this case, it did not deprive petitioner of a fair trail. The proof of petitioner's guilt was overwhelming, see infra.

Jury Charge

Petitioner also claims that the trial court failed to charge the jury correctly and consistently respecting the State's burden of proof, petitioner's "defense" of justification, and the evidentiary weight to be accorded the indictment.

State's Burden of Proof in a Criminal Case

On the issue of the "reasonable doubt" standard, petitioner contests the court's charge that proof beyond a reasonable doubt "is the same as saying proof to a moral certainty" and contends that these words diluted the reasonable doubt standard. Standing together with the use of the words reasonable doubt, words which "almost define themselves," this expression, to which no exception was taken, is hardly error of constitutional magnitude. The argument is a mere quibble. Petitioner cites People v. Forest, 50 A.D.2d 262, 377 N.Y.S.2d 492, 495 (1st Dept. 1975), wherein the court stated: "The People are bound to prove the guilt of the defendant beyond a reasonable doubt, and a charge as here that the standard of proof is to a 'reasonable certainty' or 'reasonable and moral certainty' permits a lesser standard and constituted error." However, in that case the term "moral certainty" was referred to not alone, but in conjunction with the term "reasonable certainty,"

and so phrased it probably does dilute the reasonable doubt standard. But the phrase "to a moral certainty," standing alone as a matter of plain English represents a standard even higher than the "beyond a reasonable doubt" standard.

Petitioner also complains that the court also charged: "On the other hand, if your minds are wavering, or the scales are even, or if you have such a reasonable doubt arising out of the credible evidence, or lack of it, as to any element of the particular crime submitted to you, the benefit of that doubt must be given to the defendant, and your verdict must be not guilty." The petitioner asserts that this charge decreased the State's burden, and in effect reduced the "beyond a reasonable doubt" standard to a "preponderance of the evidence" standard. However, the unfortunate phrase "scales are even" should not be taken out of context; when the charge is viewed as a whole, it is evident that the jury was instructed correctly as to the burden of proof. The phrase "the scales are even," was apparently intended to impress upon the jurors the fact that they should resolve any conflict in favor of the defendant. The court also charged:

> "Each defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence. And where two inferences may be drawn from the evidence, one consistent with guilt and one consistent with innocence, each defendant is entitled to the inference of innocence."

The court further charged:

> "Under our system of justice a defendant in a criminal action is presumed to be innocent until the contrary is proved during your deliberations in the jury room. This presumption of innocence stays with him throughout the trial and is

> destroyed, if at all, only when you during your deliberations conclude that, beyond a reasonable doubt, he is guilty of the crime submitted to you for your consideration. In this case, as in every criminal case in our State, the People acting through the District Attorney have the burden of overcoming and destroying that presumption of innocence. The defendants do not have to prove anything: in other words, they do not have to prove their innocence. The burden of proof never shifts. It is always on the People. They must sustain and prove the charges they have made. It means that the prosecutor must prove every material allegation in the indictment and every element essential to a defendant's guilt of a crime charged beyond a reasonable doubt. If there is a reasonable doubt as to the guilt of any defendant, he is entitled to an acquittal."

The court also stated that reasonable doubt

> "is not proof that the defendant is guilty by a mere preponderance of the weight of the credible evidence, as some of you who have sat in civil trials understand the rule to be in such cases. Proof of guilt by a mere preponderance of the credible evidence is not sufficient to prove the defendants' guilt in this or any other criminal case."

After having used the term "scales are even," the court instructed the jury:

> "If from the evidence there be reasonable doubt whether any defendant did any such act, he must receive the benefit of that doubt ... [and] if the necessary facts are not proved beyond a reasonable doubt, we may then have death without criminal liability, or a killing without a crime."

Still later, the court repeated the "beyond a reasonable doubt" standard.

The charge taken as a whole was fair, and did not violate petitioner's constitutional rights.

Justification

Petitioner claims now, although he failed to object to the charge at trial, that the trial court's charge regarding justification improperly shifted to petitioner the burden of proving that his actions were justified. Solomon was entitled to a charge that the People had the burden of disproving justification beyond a reasonable doubt. People v. Soto, 38 A.D.2d 734, 329 N.Y.S.2d 446, 447 (2d Dept. 1972); New York Penal Law § 25.00(1).

The trial judge instructed the jury: "Under the laws of New York, a person may use physical force upon another person when and to the extent he reasonably believes such force is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person when the actor reasonably believes that the other person is committing or attempting to commit a robbery." This is an almost verbatim recital of New York Penal Law § 35.15(1) and (2)(b). The court charged further: "Even if defendant Solomon was mistaken in his conclusion that Duncan and Isom were about to assault McFadden, as long as he reasonably believes that such assault is about to take place he is justified in using physical force to repel such an assault." This he reiterated later: "[I]t need not be proved that such deadly physical force was actually used or about to be used."

These instructions do not shift the burden of proof to petitioner to prove justification, as petitioner claims, but instead merely apply § 35.15 to the facts of this case. The mere fact that the instruction was

phrased in the positive, or with reference to Solomon, i.e., "as long as he reasonable believes," rather than in the negative, or with reference to the People, does not shift the burden to defendant. The trial court charged: "If you conclude on the basis of the evidence that the People have established to your satisfaction beyond a reasonable doubt that defendant Solomon was not justified in shooting Norman Duncan, then your verdict as to the defendant Solomon under the first count will be guilty of the crime of murder."

The court charged:

> "On the basis of what you find the facts to be, it is for you the jury to determine whether, one, Duncan or Isom or both of them acting in concert had used or were threatening the use of physical or deadly physical force upon McFadden, two, if they or anyone of them had not used deadly physical force whether Solomon from his vantage point and what he observed or could have observed reasonably believed that Isom or Duncan were about to use deadly physical force, three, that the use or imminent use of such force was reasonably believed by Solomon to be in the course of a robbery ...."

Petitioner argues that these instructions convey that in order to conclude that Solomon was justified in killing Duncan, a juror must determine that Solomon reasonably believed that deadly physical force was being used by Duncan on McFadden in the course of a robbery. This is not a correct statement of the law in New York. N.Y. Penal Law § 35.15(2). Deadly physical force may be used upon another when one reasonably believes that such other person is using or about to use deadly physical force, or is committing or attempting to commit a robbery. Therefore, if Solomon reasonably believed that Duncan was committing or attempting to commit a robbery on McFadden,

using any unlawful physical force, even if deadly physical force was not being used by Duncan, he would be justified in using deadly physical force in defense of McFadden.

However, this apparent defect in the charge was cured later on when the court charged:

> "Separate and apart from the defense of justification based on imminent assault on a third person using deadly physical force is the defense of justification based upon the reasonable belief that a robbery in which unlawful physical force is used has been or is about to be committed. If you find that the defendant Solomon reasonably believed he was witnessing a robbery being committed upon the person of McFadden by Isom and Duncan and that one or both of the latter were using any physical force against McFadden in the course ofthis robbery, then Solomon would be justified in using deadly physical force if he reasonably believed it to be necessary to defend McFadden."

The court's failure to specifically define robbery was not fatal either, since in explaining what constitutes justification, the elements of the crime of robbery were discussed, and the real issue in the case was whether the petitioner had a reasonable belief, and not whether a robbery was actually being committed under the Penal Law.

Evidentiary Value ofthe Indictment

Petitioner contends that the trial court's characterization of the indictment as "the best evidence of the charge against each defendant" was prejudicial. It is well-settled that an indictment is nothing but a formal charge on which the accused is brought to trial. An indictment is not

evidence that the offense charged was committed, and it may not be considered as evidence by the jury during deliberations. United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979). Earlier in the charge, the court stated as much: "An indictment is no evidence of guilt, and you should not construe it as such. It is an accusation in writing presented by a Grand Jury to a competent court charging a person with a crime. An indictment is not part of the evidence and, therefore, is not permitted to be taken into the jury room."

Absent a showing of gross error or a fundamentally unfair trial, habeas corpus will not lie to set aside a state court conviction on the basis of jury instructions which are merely muddled or inconsistent. Petitioner must establish that the charge as a whole so failed to submit the issues to the jury as to constitute a denial of due process. Cupp v. Naughten, 414 U.S. 141, 146 (1973); United States ex rel. Smith v. Montanye, 505 F.2d 1355, 1359 (2d Cir. 1974), cert. denied 423 U.S. 856 (1975); United States ex rel. Winfield v. Cascles, 403 F.Supp. 956, 958-59 (E.D.N.Y. 1975). The trial record in the instant case disclosed that the charge given at trial was fair in its totality and comprehensive. The claimed errors were not of substance and were neither singly nor in totality of such an egregious nature that the accused was deprived of a fair trial. As noted, on many occasions, by failing to take an exception, defendants deprived the trial judge of the opportunity to clarify or correct the points now relied on.

Admission of Evidence Concerning Petitioner's Drug Dealing Activities

Petitioner next claims he was deprived of a fair trial because

the prosecution adduced background evidence that he and his victim were members of a drug conspiracy.

When a person is charged with one crime, evidence that he committed other crimes is of course inadmissible if such evidence is offered solely to establish a criminal predisposition. United States v. Brettholz, 485 F.2d 483, 487 (2d Cir. 1973), cert. denied sub nom. Santiago v. United States, 415 U.S. 976 (1974). Evidence may be admitted, however, where relevant to an actual issue in the case, with respect to motive, opportunity, intent, preparation, plan, knowledge or absence of mistake or accident, provided that its probative value outweighs its potential unfair prejudice to the defendant. United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir.), cert. denied 442 U.S. 920 (1979).

In the instant case, the evidence relating to Solomon's involvement in the heroin trade revealed that Solomon had a motive for shooting Duncan, aside from mere protection of McFadden. The evidence revealed that Solomon and Miller were aware of Duncan's dissatisfaction with his compensation received from Miller for working as a member of the narcotics conspiracy, and that by shooting Duncan at the behest of Miller, Solomon was putting an end to any disruption of the conspiracy by Duncan or Isom. Therefore, the background information relating to Solomon's involvement in the drug dealings of Miller had probative value tending to show motive and to disprove justification, which outweighed any possible prejudice to Solomon.

Admission into Evidence of Co-defendant Miller's Hearsay Statement

Petitioner asserts that the admission into evidence through Isom

of Miller's statement to Isom one week after the murder violated his rights under the Confrontation Clause. This statement was introduced into evidence apparently as an admission by Miller, during Isom's direct examination. Isom testified that Miller told him that Miller could not believe that Isom and Duncan had planned a rebellion against him, and that his "man" could have killed Isom too; Miller explained to Isom that his "man" was Solomon. Co-defendant Miller did not take the stand in the joint trial. During summation, the prosecutor alluded to the hearsay statement on two occasions, and the court in its charge made reference to the statement. Petitioner did not object during trial to the admission of the statement, nor to the references to the statement by the prosecutor and the court; petitioner also did not request a mistrial. In view of this Court's disposition of this issue, however, it is unnecessary to consider the effect of this failure to object.

The right of a defendant to cross-examine the witnesses against him is guaranteed by the Confrontation Clause of the Sixth Amendment to the Constitution. When two or more defendants are tried in a joint proceeding, as was the case here, an extra-judicial statement of one which inculpates another may not be admitted in evidence when the maker of the statement does not testify at the trial. Bruton v. United States, 391 U.S. 123, 126 (1968).

In the instant case, it is questionable whether Miller's hearsay statement to Isom was admissible at all, even as against Miller, because the statement appears to exculpate, rather than inculpate, Miller. Therefore, the statement would not be an admission, but rather classic hearsay. Assuming

for the argument that the statement was an admission, it does appear to incriminate petitioner in the murder. Miller's statement arguably tended to inculpate petitioner by implying that petitioner shot Duncan, and perhaps that petitioner intended to kill him. In view of the overwhelming evidence of petitioner's guilt, however, this Court holds that any error committed by the introduction of the hearsay into evidence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963); United States ex rel. Ross v. LaVallee, 448 F.2d 552 (2d Cir. 1971).

There was ample other evidence adduced at trial, set out more fully supra, that petitioner was at the scene of the crime, fired a gun at the victim, and had a motive for so firing. There was also other competent evidence that he was Miller's "man."[2/]

Excessiveness of the Minimum Sentence Imposed on Petitioner

Petitioner urges that, in the alternative, the minimum sentence imposed on him is unconstitutional and should be reduced.

Where, as in this case, the sentence imposed on the defendant is within the maximum limitation of the applicable statute, no constitutional issue as to severity of sentence is presented for the federal habeas corpus court. Williams v. Smith, 454 F.Supp. 692, 697 (W.D.N.Y. 1978), aff'd. 591 F.2d 169 (2d Cir.), cert. denied 442 U.S. 920 (1979). Since the twenty-five year minimum sentence which petitioner received is authorized by New York Penal Law § 70.00(3)(a)(1) for A-1 felonies, petitioner's claim does

rise to constitutional dimensions.

Claimed Inadequacy of Trial Counsel

As there has been no exhaustion of state remedies on this point, the Court need not reach the merits of the claim. We feel constrained to observe that this case arose out of a slaying by gunfire of one member of a drug conspiracy by another on a city street in broad daylight in the presence of at least three eye-witnesses. Clarence Darrow reincarnate could not have exonerated this petitioner of his overwhelming guilt.

For the foregoing reasons, the petition for a writ of habeas corpus is denied. The Clerk of the court shall enter final judgment.

So Ordered.

Dated: New York, New York
May 6, 1981

Charles L. Brieant

Charles L. Brieant
U. S. D. J.

FOOTNOTES

1. The medical examiner, Dr. Faruk Presswella, testified that Duncan was shot in the left side of the chest, and that the bullet travelled on a slightly downward path through his body. Petitioner argues that since the bullet's course was downward, petitioner, who fired while on one knee, could not have been the successful gunman. Dr. Presswella testified, however, that he could not speculate as to the possible position of the gunman who shot Duncan, because the "human body is a mobile target." Somebody shot Duncan. Nothing in the trial record suggests it was Isom, or a man from Mars.

2. Co-defendant Miller attacked his own conviction in this Court asserting most of the same grounds advanced here. His petition for a writ was denied on December 31, 1979 by Judge Pierce of this Court in Miller v. Czarnetzky, 79 Civ. 1058-LWP. A certificate of probable cause to appeal was denied in Miller's case.

M

SPECIAL AND TRIAL TERM PART 212

THE PEOPLE OF THE STATE OF NEW YORK

against

Nathan Solomon

Defendant

File Number 1981 19 I

Motion for: CPL 440

Submitted 5-10 1979

Argued 19

Present: DONALD ZIMMERMAN

HON. J.S.C.

Papers Numbered

Notice of Motion and Affidavit Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2-3
Replying Affidavits	
Exhibits	A
Stenographer's Minutes	

MURRAY KOENIG

Re: Assigned to Justice Zimmerman

Upon the foregoing papers this motion is denied. Defendant's attack on his trial counsel is devoid of merit. Defendant's guilt was overwhelmingly established at the trial and his claims "deficiencies" of trial counsel contributed in any way to the verdict of guilty.

5/15/79

Donald Zimmerman
J.S.C.

C

S COURT
JUN 3 0 1983
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirtieth day of June, one thousand nine hundred and eighty-three.

----------X

NATHAN SOLOMON,

Petitioner-Appellant,

v.

81-2180

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

No. 81-2180

Respondents-Appellees.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner-appellant, Nathan Solomon,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart
Chief Deputy Clerk

D

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No. 83-5500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-v.-

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Nathan Solomon, respectfully seeks leave to proceed here in forma pauperis, without payment of fees and costs.

Counsel certifies that, in proceedings in the court below, petitioner was represented by counsel associated with The Legal Aid Society, Federal Defender Services Unit, appointed pursuant to the Criminal Justice Act.

New York, New York
September 27, 1983

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